United Nations A/CN.9/SR.909

General Assembly

Distr.: General
14 July 2010

Original: English

United Nations Commission on International Trade Law

Forty-third session

Summary record of the 909th meeting

Held at Headquarters, New York, on Friday, 25 June 2010, at 10 a.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) . . . . . (Switzerland)

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Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

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The meeting was called to order at 10.30 a.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules (*continued*)

Section I. Introductory rules (*continued*)

Draft article 2. Notice and calculation of periods of time (*continued*)

1. **The Chairperson** drew attention to the proposal for a revised text of draft article 2, as contained in conference room paper A/CN.9/XLIII/CRP.2/Add.3, which had been prepared by a number of delegations.

2. Drawing attention to the changes that had been introduced, he said that the first sentence of paragraph 2 expressed the important idea that the address designated by a party should be the one used for communication purposes. Under draft article 3, the parties were required to provide contact details, but so far there had been no requirement in the Rules that those specific contact details should be used. The second sentence of paragraph 2 stated that electronic communication was permitted only to specifically designated electronic addresses, in order to ensure that notices were not sent, for example, to defunct e-mail accounts. Paragraph 3 (a) dealt with the key concept "received", which was relied on in other provisions, while the concept "deemed received" was set out in paragraph 3 (b). Paragraph 4 set out the fallback position if efforts at delivery under paragraph 2 or 3 had not been successful.

3. **Mr. Seweha** (Egypt) said that the phrase "deemed to have been received" in paragraph 5 was inconsistent with paragraph 3 in that it was used to refer not only to notices deemed received under paragraph 3 (b) but also to notices actually received under paragraph 3 (a).

4. **The Chairperson** pointed out that the purpose of paragraph 5 was to determine the date of delivery. It was his understanding from English-speaking delegations that the phrase "deemed received" could include the meaning "actually received".

5. He wondered why, in paragraph 4, the word "effected" had been used in relation to delivery and whether the word "made" would be better.

6. **Ms. Smyth** (Australia) said that "effected" was the more appropriate word in the context.

7. **Mr. Castello** (United States of America) said that, pursuant to paragraph 5 of the proposed new text, the date of deemed receipt was the date of delivery or attempted delivery. In the case of electronic transmission, however, the sender often did not know whether or not delivery had been effected. It therefore seemed appropriate to create a separate rule for electronic communications. He proposed that the following sentence should be added to paragraph 5: "A notice transmitted by electronic means is deemed received on the day it is transmitted."

8. **Mr. Chan** (Singapore) proposed that the word "dispatched" should be used instead of the word "transmitted" in order to bring the Rules into line with the United Nations Convention on the Use of Electronic Communications in International Contracts.

9. **The Chairperson** said that, while it was desirable for UNCITRAL texts on different topics to be consistent with each other, it was also important, in the Arbitration Rules, to use terminology that was widely understood by the commercial and arbitration community. He asked whether others agreed that the Arbitration Rules should be aligned with the aforementioned Convention and whether the word "dispatched" would be clear to users of the Arbitration Rules. He also wondered whether the electronic community would have any difficulty with the word "transmitted".

10. **Mr. Chan** (Singapore) said that the word "transmitted" was a generic term, whereas the term "dispatched" was widely used and understood, in particular by countries that had based their national laws on the UNCITRAL Model Law on Electronic Commerce or the Convention.

11. **Mr. Sorieul** (Secretary of the Commission) said that "communication" was a key concept in the Commission's instruments on electronic commerce and communications and was understood as a process that began with dispatch and ended with receipt. However, in the electronic environment, dispatch and receipt might actually take place at the same time. Thus far the Commission had generally chosen to regard the time of dispatch as the time at which communication took place. It might therefore be appropriate to use the word "dispatch" in the current context.

12. **The Chairperson** asked whether the word "sent" would be a suitable non-technical alternative to the word "dispatched".

13. **Mr. Castello** (United States of America) said that, if the word "dispatched" were used in the sentence which he had proposed, it would be the only place in the Rules where it occurred. Since the concepts of transmission and sending were already used in the version of draft article 2 currently under discussion, the introduction of a third concept could create confusion. His delegation therefore favoured the term "sent" over the term "dispatched".

14. **Mr. Boulet** (Observer for Belgium) said that article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts defined the time of dispatch of an electronic communication as the time when it left the sender's information system and the time of receipt as the time when the communication became capable of being retrieved at a designated electronic address. In order to be consistent with the Convention, the Arbitration Rules should refer to the time when a communication became capable of being retrieved rather than the time of dispatch.

15. **The Chairperson** recalled that the concept "capable of being retrieved" had been used in the version of draft article 2, paragraph 1 (b), contained in document A/CN.9/703, but had been removed on the basis of strong opposition from Committee members. However, in that instance it had qualified communications in general, whereas in the current context it would qualify electronic communications specifically. He asked whether members wished to reintroduce the concept in the current context.

16. **Mr. Chan** (Singapore) said that the observer for Belgium had raised an important point. One of the purposes of revising the Arbitration Rules was to align them with developments in the electronic communications environment, and the concepts "sent" or "dispatched" might not be appropriate in that context.

17. **The Chairperson** said that the Secretary had confirmed that "sent" would be an appropriate alternative to "dispatched". However, the representatives of Belgium and Singapore had now raised a different point, namely at what time an electronic message should be deemed to be received. He asked the Secretary to elaborate on that issue.

18. **Mr. Sorieul** (Secretary of the Commission) said that his main concern was to ensure that the additional sentence proposed by the representative of the United States of America was understandable. Since in the case of electronic communications it was not clear whether a notice was transmitted on the day when it was "sent" or "dispatched" or on the day when it was "capable of being retrieved", the Commission simply needed to establish a rule that determined which of those two approaches should be taken.

19. **The Chairperson** said that, while the simplest solution would be to use the word "sent", the observer for Belgium had raised the question of whether the nature of electronic communication made it desirable, from the perspective of arbitration procedure, to introduce the additional requirement of "capable of being retrieved", bearing in mind that the revised text of the Rules took account of the specific characteristics of electronic communications.

20. **Mr. Sorieul** (Secretary of the Commission) said that the specific nature of electronic communications was not the Commission's main concern; instead, it needed to determine what basic rule it wished to set in place. If the notice was deemed received on the day it was sent, it would be much easier for the sender to prove receipt by the addressee. If, on the other hand, the Commission decided that the notice should be deemed received on the day it was capable of being retrieved, an approach that was more in line with generally recommended practice in electronic commerce, it would be more difficult for the sender to prove receipt, as the address might or might not be used by the addressee, and the sender might not know at what point the notice became accessible on the addressee's information system. The simplest solution would be to use the word "sent", although it should be acknowledged that in that situation the addressee could claim that the notice had never been capable of being retrieved.

21. **The Chairperson** said that, unless any delegations had fundamental objections, he suggested that the word "sent" should be used, since that provided sufficient clarity as to when the notice would be deemed received. The difficulty with the other approach was that the sender would be unable to determine whether the notice was capable of being retrieved.

22. **Mr. Boulet** (Observer for Belgium) said that the Working Group on Electronic Commerce, in which he had participated, had drafted article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts after very careful consideration and long deliberations. He was therefore reluctant to depart from what had been

established in that article, paragraph 2 of which stated that the time of receipt of an electronic communication was the time when it became capable of being retrieved by the addressee at an electronic address designated by the addressee. It also specified that an electronic communication was presumed to be capable of being retrieved by the addressee when it reached the addressee's electronic address. If a contrary rule was established, according to which the notice was deemed received when sent, it would not address the risk that a notice might leave the sender's information system but not reach the addressee.

23. It was important to understand that, just as in the case of traditional communications, there was always an intermediary between the sender and the addressee of an electronic communication; that intermediary would be able to certify the date on which the notice was received. If a notice transmitted by electronic means was deemed received on the day it was sent, the Commission would be saying the exact opposite of what had been established for traditional means of communication, where a notice was deemed received on the day it was delivered or attempted to be delivered. He saw no convincing reason to depart from the principle established by the Convention.

24. **The Chairperson** asked how the sender would prove in such a case that a notice was capable of being retrieved by the addressee.

25. **Mr. Boulet** (Observer for Belgium) said it was highly likely that the technical means to determine when electronic communications had been sent or received would be available when it became legally important to do so; in fact, he believed that such means already existed. In any case, the problem was not insurmountable; for example, the addressee could simply be asked to send an acknowledgement of receipt. With the other approach, there was a presumption that the addressee had received the notice, when that might not in fact be the case.

26. **The Chairperson** asked whether other delegations shared the concern expressed by the observer for Belgium or whether they felt that the wording "deemed received on the day it is sent" was acceptable. If an addressee was concerned that a notice sent to an electronic address might not be received, the addressee could always specify that the notice should be delivered by mail or courier instead. The difficulties that might arise with electronic communications could be recorded in the report.

27. **Mr. Chan** (Singapore) said that, since the rules being formulated would be used in the real world, it was important to understand how those rules would be applied. He cautioned against using language that might later create problems on the ground.

28. **The Chairperson** said that, according to the Secretary of the Commission, there was no difference in meaning between "sent" and "dispatched". Unless there were any other objections, he suggested that the word "sent" should be used.

29. **Mr. Chan** (Singapore) reiterated that there was a case for harmonization with the terminology used in international conventions and national law. With regard to the more important point raised by the observer for Belgium, the experts of the Working Group on Electronic Commerce had highlighted that an electronic communication sent to an addressee's electronic address was transmitted via an intermediary; consequently, it might fail to reach the addressee even after it had been received by the intermediary. It was for that reason that the Working Group had finally agreed on the phrase "capable of being retrieved". The Working Group had also been advised that, unlike any other means of communication, electronic communications were logged at each stage in the process and forensic examination could therefore be performed to determine whether a communication had been capable of being retrieved.

30. **The Chairperson** said that the observation made by the representative of Singapore was important. However, since it was his understanding that no other delegations had objected to the text as proposed, he suggested that the Committee should adopt the second revised text of draft article 2, including the additional sentence proposed by the United States delegation, with the word "sent", before engaging in further discussions during the suspension to seek a possible consensus on whether to make an addition for the specific case of electronic communications or leave the proposed text unchanged, in which case, the concerns expressed about the use of the word "sent" could be included in the report.

31. **Ms. Hu** Shengtao (China) proposed that the two sentences of the second paragraph of the revised draft of article 2 should be split to form two subparagraphs, (a) and (b), which would relate to traditional and electronic means of communication respectively. The

wording at the start of paragraph 3 should in that case be amended to read: "Pursuant to paragraph 2 (a), in the absence of such designation or authorization ...", and each reference to paragraph 2 in paragraphs 4 and 5 should be amended to refer to paragraph 2 (a).

32. **The Chairperson** asked what would be the advantage of singling out electronic communications in that way.

33. **Ms. Hu** Shengtao (China) clarified that her aim was not to single out electronic communications. It was her understanding that the current text of paragraphs 3 and 4 mainly applied to traditional means of communication; if that was the case, she believed it necessary to make a distinction between electronic and traditional means of communication in those paragraphs. In order to do so, it was also necessary to make the same distinction in paragraph 2.

34. **The Chairperson** said that the issue of electronic communications was very complex. The Commission must balance the need to produce a text that stood up to scrutiny with the need to complete its work. He asked whether any further changes were needed before the draft text of article 2 was adopted.

35. **Mr. Moollan** (Mauritius) said that the Chairperson had given all delegations a good opportunity to express their views. The Commission had in fact benefited from substantial input from the Singaporean delegation during its drafting of the second revised text of draft article 2. His delegation did not see any purpose in leaving the issue open since broad consensus had been achieved on the text as it stood, with the additional sentence proposed by the United States delegation and the use of the word "sent"; that text should therefore be adopted without further debate. All the issues had already been discussed many times and the question was essentially whether to use "sent" or "dispatched".

36. **The Chairperson** said it was his understanding that the representative of Singapore had not merely raised a question of terminology but had indicated that the issues of evidence and responsibility arising in the case of electronic communications differed from those arising with traditional communications and suggested that the Committee would be making a grave mistake to stipulate that a notice transmitted by electronic means should be deemed received on the day it was sent or dispatched.

37. **Mr. Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration) asked why the phrase "attempted to be delivered in accordance to paragraph 4" was used in paragraph 5 of the second revised draft of article 2.

38. **The Chairperson** clarified that under paragraph 4, delivery might take place at the addressee's last known place of business, habitual residence or mailing address, in which case the notice would have been delivered in accordance with paragraph 4, or delivery might not take place, in which case there would have been an attempt at delivery in accordance with the same paragraph. It was for that reason that paragraph 5 made two references to paragraph 4.

39. **Mr. Seweha** (Egypt) said that while paragraph 5 of the second revised text of draft article 2 referred to the day when a communication was deemed to have been received, paragraph 6 referred to the day when it was received. If the same expression was not used in both cases, it would be difficult to determine whether the time period should begin to run on the day the communication was received or on the day it was deemed to have been received. His delegation preferred to make a distinction, by saying "deemed to have been received" according to paragraphs 2 and 3 (b), or "received" according to paragraph 3 (a).

40. **Mr. Moollan** (Mauritius) said that one way of dealing with the issue was to change the introductory words to paragraph 5 to "the date on which a notice shall be treated as received".

41. **The Chairperson** said that that would introduce a new word — "treated" — into the equation, whereas the decision to be made was between "deemed to have been received" and "received".

42. **Mr. Moollan** (Mauritius) said that he was withdrawing his suggestion as it did not seem to find any support.

43. **The Chairperson** said that the whole issue should be clarified, because some delegates had explained that "deemed to have been received" included "received", yet paragraph 6 used the word "received", instead of keeping the expression "deemed to have been received". He suggested that, for the sake of consistency, the expression "deemed to have been received" should be used at the end of paragraph 6 as well as in paragraph 5.

44. **Mr. Chung** Chang-ho (Republic of Korea) said that his delegation felt that "received" in paragraph 6 comprised both "physically received" and "deemed to have been received", hence there was no need for the addition.

45. **The Chairperson** said that if there was no support for the addition, he took it that the report would show that the word "received" in paragraph 6 included "deemed to have been received".

46. *It was so decided.*

47. **Ms. Smyth** (Australia), referring to paragraph 2, said that her delegation would like the report to show that the informal drafting group had come to the understanding that the reference to an address designated "specifically for this purpose" would include contracts whereby parties had given each other designated addresses for the purpose of receiving notices, including arbitration notices. The words "specifically for this purpose" were not meant to exclude general contractual designations, which would include other notices in addition to arbitration notices.

48. **The Chairperson** said that if he did not hear any objection he took it that that point would be included in the report as requested.

49. *It was so decided.*

Draft article 7. Number of arbitrators

50. **The Chairperson** said that draft article 7 had been discussed at length and that the Working Group had agreed to preserve the fallback position of three arbitrators, subject to the slight addition in paragraph 2 for cases where the respondent could not be found. The Committee had to decide whether to preserve that option or to adopt the proposal from the Mexican delegation in document A/CN.9/704/Add.6. That proposal provided that only one arbitrator, rather than three, should be appointed if the parties had not agreed on the number of arbitrators, and that the sole arbitrator might, at the request of the parties, designate three arbitrators.

51. **Mr. Castello** (United States of America) said that introducing that proposal into the Rules would result in delays, because a party might decide at any point of the proceeding to request a three-person panel. That would require the submission of new briefs and the holding of a new hearing on that point, thereby lengthening the proceedings. It was also unclear what would happen to decisions that had already been made in the course of the proceedings. Given the many possibilities of complication and delay, his delegation supported the default rule of three arbitrators.

52. **Mr. Jacquet** (France) said that the Mexican proposal would reverse the position which had been adopted by the Working Group after thorough reflection, and should therefore not be considered.

53. **Ms. Aguirre** (Argentina) said that her delegation agreed that the solution of three arbitrators should be kept.

54. **The Chairperson** said if he heard no support for the Mexican proposal, he took it that draft article 7 was adopted as drafted.

55. *Draft article 7 was adopted.*

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

Paragraph 4 (continued)

56. **The Chairperson** said that a number of delegations had requested that the discussion of draft article 17, paragraph 4, which had been adopted at the 907th meeting, should be reopened.

57. **Ms. Smyth** (Australia) said that, following consultations with other delegations, she wished to propose that the second sentence of paragraph 4, as adopted by the Committee of the Whole at the 907th meeting, should be replaced by the following wording: "Such communications shall be made at the same time, except as otherwise authorized by the arbitral tribunal, if it may do so under applicable law." Such a formulation would better reflect the conclusions reached by the Working Group.

58. **Mr. Castello** (United States of America) said that his delegation was prepared to accept that proposal, but with the proviso that the word "authorized" should be replaced by the word "permitted". The word "permitted" had been discussed at length and, as had been indicated by the representative of Mauritius, it was the appropriate word to use, because the aim of the draft article was to capture both prospective and retrospective permission. Using the word "authorized" would mean that there had already been a formal authorization, whereas that was not necessarily the case.

59. **Mr. Moollan** (Mauritius), **Ms. Aguirre** (Argentina) and **Mr. Lebedev** (Russian Federation) endorsed the proposal.

60. **The Chairperson** said if he heard no objection, he took it that the word "authorized" would be replaced by the word "permitted".

61. *It was so decided.*

The meeting was suspended at 12.05 p.m. and resumed at 12.55 p.m.

Draft article 2 (continued)

62. **The Chairperson** drew attention to a third revised text of draft article 2 proposed by the United States of America, which had been distributed in the room.

63. **Mr. Castello** (United States of America) said that the tentative view of the consultation group had been to avoid requiring a complicated proof of electronic receipt for ordinary exchanges of pleadings during arbitration proceedings, but to require such proof of receipt for a notice of arbitration. On that basis, his delegation had revised its proposed text to read as follows: "A notice transmitted by electronic means is deemed received on the day it is sent, except that a notice of arbitration so transmitted will only be deemed received on the day when it reaches the addressee's electronic address". The phrase "reaches the addressee's electronic address" had been taken from article 10, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts.

64. **Mr. Chan** (Singapore) said that he had initially endorsed the language of the revised draft, but that having seen the whole proposal in writing, it seemed that the natural conclusion of any reader would be that a notice transmitted by electronic means other than a notice of arbitration would be deemed to have been received even if it did not reach the addressee's electronic address. He requested that the proposal should be reformulated to avoid creating such an unfortunate impression.

65. **Mr. Moollan** (Mauritius) said that he was surprised at the reaction of the representative of Singapore, who had been a member of the drafting group that had reached a consensus on the proposal. It should be recalled that the decision of principle had been to severely limit the instances where notices by electronic means would be allowed under the Rules. It had been decided that a party must have designated an electronic address in order for that address to be used. The proposal merely added another layer of protection for notices of arbitration, which constituted the very foundation of the jurisdiction of the arbitral tribunal.

66. His delegation felt that the proposal struck the right balance in that it allowed the tribunal and a party facing a non-participating respondent to proceed normally with proceedings, but also made sure that the fundamental document — the notice of arbitration — reached the addressee.

67. **The Chairperson** said that he had thought that the observation concerned only situations where, in the normal course of arbitration, a notice was sent to the opposite party and it bounced back, but that for the purposes of ordinary communication, the notice would be considered received. He said if he heard no further objections he took it that the United States proposal was accepted.

68. *It was so decided.*

69. *Draft article 2, as orally amended, was adopted.*

70. **The Chairperson** said if he heard no objection he took it that the Committee wished to adopt the draft revised Rules as a whole.

71. *The draft revised UNCITRAL Arbitration Rules as a whole were adopted.*

The meeting rose at 1.10 p.m.